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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET NO. 1090

SAMUEL BERGER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 14, 1970. That judgment affirmed petitioner's conviction under 18 U.S.C. §§ 371 and 1854.

### OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is appended as Appendix A hereto.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1970. Time to file this petition was, on November 13, 1970, extended to December 12, 1970 by Mr. Justice Harlan. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Did the denial of petitioner's pretrial severance motion, on the basis of an overall conspiracy charge which the prosecution made no effort to prove and on the basis of a false forecast that proof of guilt under the various counts would be by the "same" evidence, violate Rule 8 of the Federal Rules of Criminal Procedure and deprive petitioner of his right to a fair trial by an impartial jury?

2. Was petitioner's right to a fair trial by an impartial jury unduly prejudiced by the joinder of the New York and Chicago counts, without compensating benefits in terms of judicial economy?

3. Was petitioner deprived of his right to a fair trial by an impartial jury when the trial judge interrogated a juror out of the presence of counsel after the jury had begun its deliberations?

4. Were petitioner's Fifth and Sixth Amendment rights violated when the prosecution, having been advised that he would assert his right not to testify and knowing that he was a "target" of the inquiry, nevertheless summoned him before the grand jury and forced him to invoke his rights before that body, which then proceeded to indict him?

## STATUTES AND RULES INVOLVED

Section 1954 of Title 18, United States Code, is set out in Appendix B to this petition.

Rule 8 of the Federal Rules of Criminal Procedure is as follows:

> "(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> "(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 14 of the Federal Rules of Criminal Procedure is as follows:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

## STATEMENT OF THE CASE

Petitioner Berger was charged only under the third count of a three-count indictment. He was accused of conspiring to offer and pay an unlawful kickback to Floyd Webb, a trustee of a large Chicago union pension fund, in order to secure from the fund a $1.5 million mortgage commitment for the Cashmere Corporation of America. He was convicted, and sentenced to five years in prison and to a $10,000 fine. Petitioner is 60 years old.

Webb died before trial—indeed, before anyone had implicated him in this matter. (163a A)* The case against Berger hinged on the uncorroborated testimony of a single prosecution witness, a Chicago mortgage broker named Robert Graff.

Graff, who entered a plea of guilty the day before trial began, testified that he agreed to help Cashmere get a loan from the fund, that when his close friend Webb demanded $20,000 as a condition to acting favorably on the Cashmere loan application, he promised and paid it to him, and so informed Berger, who was assisting him to secure the loan. The prosecution made no effort to establish at trial whether Webb had in fact demanded or been offered and paid the $20,000. It did not explore Webb's finances. It produced no witnesses, other than Graff, either to the alleged offer or to the alleged payment. And Graff testified that Berger was the only person he had told about the alleged arrangement.

Graff's credibility was sharply disputed. Graff admitted that until Webb's death in February of 1968, he

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* Transcript references are to the printed record in the Court of Appeals, a copy of which will shortly be filed with the Clerk of this Court.

had given the FBI and government counsel an entirely different—and wholly innocent—version of events. (1632A-1633A) A number of plausible motives for Graff falsely to incriminate another were adduced during the course of the trial. And his truthfulness on the stand was repeatedly brought into question. He testified, for example, that he had never signed a written agreement with Cashmere Corporation, but when confronted with such a document reluctantly conceded it bore his signature. (1760A-1777A) Other prosecution witnesses, who lacked motive to fabricate, flatly contradicted portions of his testimony.

Thus, the case against Berger depended entirely on the testimony of Graff, and that testimony was suspect.

But before the jurors heard Graff on the alleged payment to Webb, they were subjected to several weeks of extraordinarily vivid and highly prejudicial testimony regarding *another* alleged conspiracy involving *another* set of characters—not including Berger or Webb or Graff.

According to count two of the indictment, before Cashmere obtained its mortgage loan in Chicago, it had endeavored to obtain financing in New York. The indictment charged that Cashmere's New York lawyer Travis Levy, New York welfare fund official Frank Zulferino, and New York labor figure James Plumeri conspired to offer and pay an unlawful kickback to Zulferino in order to obtain a mortgage loan for Cashmere. The prosecution's key witness to the New York conspiracy, Herbert Itkin, legal counsel to Zulferino's welfare fund, testified that, although secretly an FBI informant at the time and not named as a defendant, he had been the architect of the scheme to make unlawful payments to Zulferino.

The jury could have found that in June of 1963 Levy had come to Itkin for aid in securing a mortgage loan for his client, that Itkin—anxious to earn the standard finder's fee—plotted with Zulferino and Plumeri to issue a phony mortgage commitment in return for kickbacks, that payments were indeed made, and that Levy had been made aware of Itkin's scheme.

In November of 1963, when the New York welfare fund's mortgage commitment proved worthless, Cashmere's president, Shiah Arsham, turned to Chicago and to Graff, whose efforts yielded a solid mortgage commitment—against collateral which an independent appraiser determined would adequately cover the commitment. (1831A-1837A)

Although Itkin's activities related only to the New York count, his testimony dominated the entire trial. Over a thousand pages of transcript, he produced an unforgettable cloak and dagger story of skullduggery—largely his own—relating how loans generally are obtained from union welfare and pension funds. Drawing upon his own vast experience,[1] he told the jury in the most indelible terms that none of "these transactions" is legitimate, that no one seeks a loan from a union pension or welfare fund unaware that he will be required to make payments to the appropriate officials.

> "In other words, before we get a mortgage we have to make payoffs. (313A)
>
> * * *

[1] To underscore his "expert" status, Itkin confessed that he had himself secured loans from this same Chicago pension fund by paying kickbacks to trustee David Wenger, that his Diner's Club credit card charges alone exceeded $100,000 in a single year, that he filed no Federal income tax returns, that he stole from clients and lied to his FBI contact about his own criminal activities, and that by keeping the FBI apprised of *some* of his actions he avoided both taxation and prosecution.

"There was nobody innocent in those deals. Nobody would come to me as a lawyer to get a mortgage if he could get it in any decent, sincere place. They only come to me because they didn't get the financing they wanted elsewhere. They wanted more than they should get." (1191A-1192A)

Itkin admitted that he did not know Graff or Webb, and was in no way involved in the Chicago mortgage loan application—the very success of which deprived him of his finder's fee in the New York transaction. His sole contact with Berger was a meeting in December 1963. There, Itkin unsuccessfully demanded that in the event Cashmere obtained a loan elsewhere, he should nevertheless be reimbursed for his "expenses" of $48,000.[2] (496A-503A)

Before trial and repeatedly during the trial Berger moved for a severance of the Chicago and New York counts. The prosecution resisted the pretrial motions by arguing that "the evidence against all defendants will be substantially the same,"[3] (52A) and noting that count one of the indictment charged Levy, Zulferino and Plumeri—the only defendants named therein—with conspiracy as to *both* the New York kickback to Zulferino *and* the alleged Chicago kickback to Webb. Once this "overall" count had served its purpose—to ward off severance—it was discarded; upon the close of the prosecution's case, the prosecution itself elected

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[2] Itkin did testify that he also went to Berger's office in September 1965 again to demand payment of the $48,000. This alleged meeting was not referred to in his contemporaneous FBI reports or in his grand jury testimony. (510A-515A, 687A-705A)

[3] On appeal the prosecution reversed itself and proclaimed the "separateness" of the proof under the New York and Chicago counts, the better to rebut Berger's claim that the jury had been confused and could not segregate the evidence.

to dismiss count one. (1935A) It had introduced no evidence of any such "overall" conspiracy, and none linking the "overall" defendants to the alleged Chicago kickback. And, as we have noted, the indictment did not charge Berger with participation in the "overall" conspiracy—he was charged only in the Chicago count.

A bizarre incident occurred when the jury was sequestered after its first day of deliberations. (2140A-2158A) Although the trial judge had explained his reasons for sequestering the jury, one elderly juror, a woman "close to her eighties," mistakenly believed the jury had finished its work. She walked out of the hotel where the jurors were to be kept, went home and spent the night with her husband. The next day, a Sunday, after talking to a neighbor and realizing the trial was not over, she appeared on the courthouse steps and was taken to the trial judge by the prosecutor, who said he found her with another prosecutor involved in this case. (2144A). The judge interrogated her *in camera* without permitting counsel to participate. (2140A-2142A) The judge later told counsel that the juror had confessed she had not understood his instructions. The court permitted her to rejoin her fellow jurors.

Only thereafter did he advise counsel as to what had occurred. After a motion for a mistrial was made and denied, the court called the juror back and interrogated her in the presence of counsel. She explained:

> "I just didn't realize. I thought it is all finished. I didn't see anybody so I went home. I didn't mean anything, your Honor (2150A).
>
> * * *
>
> "I didn't see any people so I figure it is finished. I didn't have the sense to ask whether I can go

home or not, but it seemed to me that everything is over. (2151A).

"No, I'm not upset. I'll do my best to please." 2156A).

The juror was then returned to the jury room.

Thereafter, the jury convicted all of the defendants remaining in the case—Levy under both counts, and Berger and Mrs. Feinstein (a friend of Levy's who shared in the finder's fee in the Chicago transaction) under the Chicago count.[4] Petitioner was sentenced to five years in prison and to a $10,000 fine.[5]

* * *

The Court of Appeals reversed the convictions of Levy and Feinstein under the Chicago count, holding that no evidence linked them to the alleged kickback to Webb. But it sustained Berger's conviction. Joinder of the New York and Chicago counts was justified on the theory that the two alleged conspiracies were, in the language of Rule 8 of the Federal Rules of Criminal Procedure, "clearly parts of 'the same series of acts or transactions constituting an offense or offenses.'" The court also pointed to "Levy's alleged participation in both transactions," although it held there was

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[4] Berger and Feinstein were charged only under the Chicago count. All charges as to Plumeri and Zulferino had been severed early in the trial as the result of the illness of the former and the death of trial counsel to the latter. Itkin was not named as a defendant. Nor was Cashmere Corporation or its president, whose extensive testimony indicated no awareness of any scheme, either in New York or in Chicago, to pay kickbacks to anyone.

[5] The five-year sentence is the maximum permitted under the conspiracy statute, 18 U.S.C. § 371. The maximum sentence permitted for the substantive offense is three years. See 18 U.S.C. § 1954.

no evidence to link Levy criminally to the Chicago offense. It also argued that Itkin, by alluding in Berger's presence to his own New York wrongdoing, somehow entitled himself to testify against Berger on the Chicago count.

The court rejected Berger's contention that Itkin's sweeping testimony about the general nature of union pension fund loans—admitted only as to "Itkin's state of mind" but repeated *verbatim* by the prosecution in its summation—had inevitably prejudiced the jury which was later called upon to decide Berger's guilt or innocence. It asserted that the New York and Chicago transactions were "quite separate." And it concluded that the jury, which had erroneously convicted Levy and Feinstein on charges as to which there was no evidence, had no trouble in segregating four weeks of testimony—punctuated as it was by endless bench conferences and disputes about what testimony was admissible as to what defendants and for what purposes—or in following the judge's limiting instructions.

## REASONS FOR GRANTING THE WRIT

The use by the prosecution of a dramatic informant witness not only to incriminate his own alleged accomplices but massively to contaminate jury determinations relating to charges as to which he admittedly had no knowledge, raises important questions for the administration of criminal justice. At stake is the integrity of the safeguards, incorporated in Rules 8 and 14 of the Federal Rules of Criminal Procedure, to prevent undue prejudice to the rights of defendants to have their guilt or innocence fairly and individually decided.

**I. Denial of his pretrial severance motion deprived petitioner of his right to a fair trial by an impartial jury.**

This Court last addressed itself to the problem of the administration of Rule 8 in *Schaffer* v. *United States*, 362 U.S. 511 (1960). In *Schaffer*, the Court held that, where a conspiracy count essential to the denial of a pretrial Rule 8 motion for severance failed of proof and was dismissed before submission of various substantive counts to the jury, severance need not automatically have been ordered at that point. The Court held, over the dissents of four Justices, including Mr. Justices Black, Brennan and Douglas, that no "hard-and-fast formula" requiring severance should be adopted in this situation.

The present case indicates how easily the integrity of *Schaffer* and of Rule 8 is undermined through the use of several simple draftsman's devices. In *Schaffer*, the conspiracy count linking the various substantive counts was dismissed for failure of proof. It was not suggested that inclusion of the conspiracy count was in bad faith.

Here, on the other hand, the keys to the prosecution's successful efforts to resist pretrial severance—the "overall" conspiracy count, the naming of the same three defendants in each count, and the argument that proof of the separate New York and Chicago counts would be established by the "same" evidence—proved to be a charade. The prosecution itself moved to dismiss count one, the overall conspiracy count, not because it had failed of proof, but because it had not attempted to offer any proof. Indeed, the notion of an "overall" conspiracy was at odds with the prosecution's theory of the case. Similarly, the naming of three defendants common to each count proved to be

only a draftsman's technique. No effort was made at trial to tie Zulferino and Plumeri to the Chicago loan application, and the Court of Appeals held there was no evidence to link Levy to the alleged Chicago conspiracy. As to the prosecution's pretrial argument that guilt under the Chicago and New York counts would be established by the "same evidence," the prosecution argued precisely the opposite during the trial and on appeal—that the proof was so "separate" that the jury could not possibly be confused in making its determinations under each of the counts. Guilt under the New York count turned solely upon Itkin's testimony. Guilt under the Chicago count hinged upon Graff's testimony. The two men did not know one another, and had never met.

If the integrity of Rule 8, as construed in *Schaffer*, is to be preserved, this Court must make it clear that Rule 8 cannot be evaded by the assertion of paper charges and evidentiary forecasts which the course of events prove not to have been seriously intended. Otherwise, "overall" conspiracy charges or other allegations of "commonality" will become standard devices used by prosecutors to gain tactical advantages to which they are not entitled.

**II. Joinder of the New York and Chicago counts unduly prejudiced petitioner's right to have the charge against him fairly decided, without compensating benefits in terms of judicial economy.**

The court below did not heed this Court's admonition in *Schaffer* to be "particularly sensitive" to possible prejudice where the justification for denying a pretrial severance motion has disintegrated. Here, there was a massive contamination of the process by which the jury determined Berger's guilt or innocence

under the Chicago count. Unlike the *Schaffer* case,* here evidence was received over a four-week period in an exceedingly chaotic manner. Hardly a sentence of testimony was taken without objection. There were endless disputes as to whether particular testimony was to be admitted under which count, and for what purpose. Some of Itkin's testimony, for example, was admitted only as to the count two defendants. Some of his testimony was held admissible, over objection, as to petitioner under count three. Perhaps the most prejudicial of his testimony, that relating to the generally corrupt way in which union pension fund loans allegedly are obtained, was admitted, over objection, only with respect to Itkin's "state of mind."

Included in this category was devastatingly prejudicial testimony that in 1961 and 1962, Itkin had obtained loans from the *same* Chicago union pension fund by making payments to one of Webb's fellow trustees, David Wenger. (1241A-1244A) Itkin was even allowed to testify that he had told his FBI supervisor in September of 1965 that someone had told him there was "an enormous payoff" in connection with the Chicago pension fund loan to Cashmere, although "I was not involved in that end of it." (1181A-1194A). Is this the kind of testimony, on no theory admissible on the merits of count three, which even the most sophisticated jury could keep from influencing its judgment as to whether Webb was in fact promised and paid a kickback?

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* In *Schaffer*, the evidence as to the various substantive counts was well compartmentalized, the introduction of evidence was orderly and unlikely to confuse, and the trial judge's instructions were conceded to be meticulously fair. The Court concluded that the petitioners failed "to show any prejudice that would call Rule 14 into operation."

That the jury was likely to be confused by such testimony is evident on its face. That the jury was in fact confused is evidenced by its conviction under count three of two defendants, Levy and Mrs. Feinstein, as to whom the court of appeals held there was no evidence. That the jury was not the "ideal" jury capable of following this complicated trial is clear from the incident involving the elderly woman juror who could not follow the trial judge's simple instructions as to where to spend the night, and was unable to determine when the jury, of which she was a part had finished its deliberations. Petitioner, of course, was entitled to the vote of twelve jurors able to understand the charges against him and to segregate out testimony not admitted against him under count three. It is hardly disputable that he was deprived of this right in this case.

Joinder could not here be justified on the ground of judicial economy. It was apparent from the start that entirely separate witnesses and evidence would be required to establish guilt under the respective New York and Chicago counts. Whether Itkin had made payments to Zulferino and Plumeri in New York and had told Levy about it was entirely separate from whether Graff had made payments to Webb in Chicago and had told Berger about it, despite the prosecution's efforts to tie them together in the minds of the jurors.

Moreover, Zulferino and Plumeri, the alleged recipients of kickbacks under the New York count, had their cases severed early in the trial—Zulferino on the second day of trial and before Itkin was called to the stand. They presumably will be tried again. The only remaining defendant under the New York count, Levy,

had at best a peripheral role; the question was whether he acted lawfully as an attorney, or whether he had been drawn by Itkin into the New York conspiracy. Nothing was to be gained by trying the New York charge against Levy together with the Chicago count against Berger except the tactical advantage which the prosecution achieved by tagging Berger with the lurid confessions of Itkin—who was not a witness to the alleged Chicago conspiracy.

That the decision below marks a substantial departure from the way the joinder and severance rules have heretofore been administered, and threatens their integrity, is clear.

Rule 14 focuses upon the problem of actual prejudice arising during the course of trial. The proper test has been well summarized by Judge Weinfeld, who in *United States* v. *Kahaner*, 203 F. Supp. 78, 81 (S.D. N.Y. 1962), noted

> "But a single joint trial, however desirable, may not be had at the expense of a defendant's right to a fundamentally fair trial. Economy of judicial manpower and the prompt trial of those accused of crime must be weighed against possible unfairness to a defendant . . . . The ultimate question is whether, under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's acts, statements and conduct."

In applying this test, other Courts of Appeals have not permitted the pursuit of tactical advantage to obscure the individualization of the criminal process. In

*United States* v. *Spector*, 326 F.2d 345 (1963), the Court of Appeals for the Seventh Circuit ruled that the nominal naming of a common defendant under all the counts of an indictment would not justify joinder where the focus would in fact be upon different defendants under each of the counts. The Court of Appeals for the District of Columbia Circuit in *Drew* v. *United States*, 331 F.2d 85 (1964), applied the "simple and distinct" test previously fashioned in that Circuit to determine whether there had been prejudice to the rights of defendants tried together. The court held that charges arising out of two robberies should not have been tried together because "the evidence of each crime [was not] simple and distinct."

None of the aforementioned cases involves, as does the present case, the massive contamination of the fact-finding process by a single dramatic witness purportedly testifying as to "other" matters. Nor do they involve the same collapse of the judicial economy argument; here the principal defendants in the "other" count dropped out of the case early, necessitating in any event a separate trial of the New York and Chicago counts.

The authors of the American Bar Association's Standards Relating to Joinder and Severance (Approved Draft 1968) page 29, have said that the test for whether joinder is proper

> "involves a weighing of the possible prejudice to the defendant from joinder against the public interest in avoiding duplications, time-consuming trials in which the same factual and legal issues must be litigated . . . . On this score, joinder of offenses not part of a single scheme or plan is difficult to justify."

The same authors, with respect to the argument that a trial court's limiting instructions suffice to avoid prejudice, have noted at p. 41 that

> "Although 'our theory of trial relies upon the ability of a jury to follow instructions.' *Opper* v. *United States*, 348 U.S. 84, 95 (1954), what empirical evidence is available tends to show that in some situations jurors do not do so."

This Court itself has, in such recent cases as *Bruton* v. *United States*, 391 U.S. 128 (1968), and *Jackson* v. *Denno*, 378 U.S. 368 (1964), recognized the truth of Mr. Justice Jackson's remark in *Krulewich* v. *United States*, 336 U.S. 440, 453 (1946), that

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Where as here the prejudicial impact of unrelated testimony is clear, where as here the argument for judicial economy does not exist, and where as here it is unlikely that the jurors can segregate four weeks of testimony—punctuated every few minutes by bench conferences and disputes about what testimony was admissible as to what count and for what purpose—denial of repeated motions to sever cannot be justified.

**III. Petitioner was deprived of his right to a fair trial by an impartial jury when the trial judge interrogated a juror not in the presence of counsel after the jury had begun its deliberations.**

When the trial judge interrogated an elderly woman juror, who had been brought to his chambers Sunday morning by the prosecutor, as to why she had separated herself from the other jurors, he deprived petitioner

of jealously guarded rights.[1] This defect in the proceedings was not remedied by recalling her from the jury to repeat her answers before counsel, or by the opportunity given counsel themselves to interrogate the juror. No one knows what in fact was said between judge and juror at the original interrogation, or between prosecutor and juror. She had once been led through her story by the judge. And counsel ought not to have been placed in the untenable position of having to press a juror as to the accuracy of the trial judge's account of their private conversation.

We have found no precedent to justify this *ex parte* contact between judge and juror after a jury had been sequestered and had actually begun its deliberations.

The court below itself indicated that it would have been "the better course" for the judge to have deferred questioning the juror until counsel were present. To make the impact of such a deviation from sound procedure depend upon a showing of prejudice amounts to legitimating the deviation, for how can counsel ever show that a conversation at which they were not present and as to which they had no transcript might have affected the juror's state of mind?

This is particularly true when the juror was as confused and helpless—and as anxious to "please"—as this particular juror confessed to be.

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[1] See Kalven & Zeisel, The American Jury 460 (1966); *United States* v. *Miller*, 411 F.2d 825 n. 14 (2d Cir. 1969), on the importance of preserving a defendant's opportunity to convince even a single juror.

**IV. Petitioner's rights under the Fifth and Sixth Amendments were violated when he was forced to appear before the grand jury considering his indictment after advising the prosecution that he would assert his privilege against self-incrimination and his right to counsel.[a]**

When Berger was summoned to appear before the grand jury which eventually returned an indictment against him, his counsel notified an Assistant U. S. Attorney that Berger believed himself to be a target of the grand jury's investigation, and that he did not wish to appear. He reported that it was Berger's purpose to invoke his constitutional privilege against self-incrimination, but that he feared to invoke it in the presence of the jury would prejudice his case before them. Finally, he said that should Berger be compelled to appear, he wished to have counsel present with him in the grand jury room.

His requests were denied. Berger was summoned to appear before the grand jury where he invoked his privilege against self-incrimination and his right to counsel. He was indicted.

Whether or not one known to be the target of a grand jury investigation should be summoned to appear before the grand jury, once the prosecution has been apprised of his intention to invoke the privilege against self-incrimination and his right to counsel, he should not be called and forced to invoke his rights and privileges in the presence of the grand jurors. To do so inhibits the exercise of important constitutional rights and penalizes resort to them. It transmutes these rights into weapons useful to the prosecution in per-

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[a] This point was raised and preserved, but was not argued in the court below, because that court had repeatedly rejected similar arguments in a series of recent cases.

suading grand jurors that the person ought to be indicted.

This Court should make clear that summoning a prospective defendant in these circumstances violates his Fifth and Sixth Amendment rights and taints any indictment obtained.

## CONCLUSION

For the foregoing reasons the petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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December 12, 1970

# APPENDIX

# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 903-905—September Term, 1969.

(Argued July 9, 1970 Decided October 14, 1970.)

Docket Nos. 33962, 34321, 34322

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UNITED STATES OF AMERICA, *Appellee*,

—v.—

SAMUEL BERGER, YVETTE FEINSTEIN and TRAVIS LEVY,
*Appellants*.

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Before: FRIENDLY, SMITH and HAYS, *Circuit Judges*.

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Appeals from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge*, for conspiring to cause illegal kickbacks to be paid to labor union welfare and pension fund officials in violation of 18 U.S.C. § 371 (1964) and 18 U.S.C. § 1954 (1964).

Affirmed as to Berger. Affirmed in part and reversed in part as to Levy with direction to dismiss Count Three as applied to him. Reversed as to Feinstein with instructions to dismiss the indictment.

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HAYS, *Circuit Judge:*

I.

Samuel Berger, Yvette Feinstein and Travis Levy appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York. The indictment under which they were convicted was in three counts, each charging conspiracy to pay illegal kickbacks to labor union welfare and pension fund officials in violation of 18 U.S.C. § 371 (1964) and 18 U.S.C. § 1954 (1964).

Count One was dismissed at the close of the government's case. Levy was found guilty as charged under Counts Two and Three; Berger and Feinstein were found guilty as charged under Count Three. Levy received concurrent sentences of two years' imprisonment and a fine of $10,000 on each count. Berger received a sentence of five years' imprisonment and a fine of $10,000. Feinstein received a suspended sentence and was placed on probation for two years. We affirm the convictions of Berger on Count Three and of Levy on Count Two, and reverse the convictions of Feinstein and Levy on Count Three.[1]

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[1] The reversal of Levy's conviction on Count Three means only that he will be relieved from paying one of the fines imposed upon him.

## II.

Briefly described, the evidence introduced at trial detailed the efforts of Shiah Arsham,[2] who in late 1963 took over the management of Cashmere Corporation of America of Cleveland, Ohio, a manufacturer of sweaters and yarn, to obtain desperately needed financing for the corporation. Shortly after he became president of Cashmere, Arsham sought the assistance of Travis Levy, a Manhattan attorney. In early 1964 Levy and Arsham made a number of attempts to obtain mortgage financing from various sources without success.

Finally Levy approached Stephen Birnbaum,[3] a New York City mortgage broker, to discuss the possibility of obtaining a $1,500,000 mortgage loan for Cashmere from a labor union pension fund. In late May, Birnbaum proposed to his associate Herbert Itkin[4] that they develop the deal together. Various financial arrangements were made between the parties and Itkin enlisted the aid of James Plumeri,[5] who agreed to propose the Cashmere loan to the Furriers Union. Because of Cashmere's inability to obtain a promised appraisal of its assets, this deal fell through. By this time it had become necessary for Cashmere to obtain interim financing, while efforts continue to obtain a long term mortgage commitment.

The effort to obtain interim financing provided the basis for Count Two of the indictment. The government proved, primarily through the testimony of Itkin, that Itkin, on behalf of Levy and with his knowledge, made several illegal

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[2] Arsham was named as a co-conspirator in all counts of the indictment. He testified as a witness for the government.

[3] Birnbaum testified as a witness for the government pursuant to a grant of immunity.

[4] Itkin testified as a witness for the government.

[5] Plumeri who was indicted on all three counts, became ill during the trial and a mistrial was declared as to him.

payoffs to Frank Zulferino,[6] the president of Local 10 of the International Brotherhood of Production, Maintenance and Operating Employees in return for a letter of financial commitment purporting to obligate Local 10's welfare fund to provide Cashmere with a $1,200,000 mortgage loan. It was understood that the commitment would never be used, its agreed-upon purpose being to convince banks to lend Cashmere short-term money. After several revisions of the letter and much in-fighting among the participants, Levy and Arsham in October 1964 received a commitment letter which they considered satisfactory. However the commitment did not prove helpful and they were still unable to obtain bank loans.

At the same time as the attempts to obtain interim financing on the basis of the Local 10 commitment were taking place, negotiations on the transaction which forms the basis of Count Three of the indictment were proceeding. The government proved, primarily through the testimony of Robert Graff,[7] a Chicago mortgage broker, that Graff, in collaboration with Berger, paid Floyd Webb,[8] a trustee of the Central States, Southeast, and Southwest Area Pension Fund of the International Brotherhood of Teamsters $20,000 in return for the Teamsters' giving Cashmere a mortgage of $1,500,000.

## III.

### Count Two

Levy concedes that if the jury believed Itkin they could have found Levy a knowing participant in the Local 10 kickback. However he argues that (1) it was improper to

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[6] Zulferino was indicted on all three counts, but a mistrial was declared as to him when his attorney died during the trial.

[7] Graff pleaded guilty to Count Three on the eve of trial and testified as a government witness.

[8] Webb died before the indictment was returned.

allow Itkin to testify as a co-conspirator; (2) Itkin's explanation of why he lied to the F.B.I. was improper and prejudicial; and (3) certain portions of the trial court's charge were erroneous.

Levy contends that since Itkin was not named as a co-conspirator in the indictment his testimony as to conversations he had with other alleged co-conspirators was hearsay and not admissible against Levy. This claim lacks merit since "it is enough if evidence, other than that whose admissibility is under challenge, disclosed . . . [a conspiracy]." *United States* v. *Annunziato*, 293 F.2d 373, 378 (2d Cir.), cert. denied, 368 U.S. 919 (1961).

Independent evidence established that while Itkin was reporting to and working with the F.B.I., he continued to make illegal pay-offs on his own, contrary to F.B.I. instructions. Indeed he admitted that he lied to the F.B.I. in order to conceal his own illegal involvement in the Cashmere deals. On these facts it was entirely proper to admit his testimony as that of a co-conspirator.

On redirect examination Itkin testified that he lied to the F.B.I. to conceal the danger to his life that was involved in his activity.[*] The trial court instructed the jury as follows with respect to this evidence:

> "Ladies and gentlemen, this testimony of the witness is not received for the truth of what was said either by

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[*] The portion of Itkin's testimony most strongly objected to is contained in the following colloquy:

> "Q. But you said also on cross-examination that you concealed various things from Agent Vericker [an F.B.I. agent]; correct? A. Yes, I did, sir.
>
> Q. Not only that, but you lied to him on many occasions; is that correct? A. Yes, I did.
>
> Q. Why did you lie? A. I lied for two reasons. One is that, as in this case, I lied to him in June of 1965. My part of the involvement was to a great extent over. Mr. Vericker had one overriding concern and that was more important than anything else and he always judged what we did by the concern for my life and . . ."

> the witness or by third persons but solely on the issue of his credibility. On cross-examination he was asked certain questions as to why he did certain things and his state of mind. I am permitting the government on redirect to explore that solely on the question of credibility. What the witness said to somebody about the matter or what the FBI said to him about it is not evidence as to the truth of what was said, but it is evidence pertaining to the witness's state of mind and it will be up to you and you alone to determine at the conclusion of the trial the credibility of the witnesses and the weight that you extend to the testimony given by each."

There was no error in the admission of the testimony accompanied by this instruction. *United States* v. *Franzese*, 392 F.2d 954, 960 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969). See also *United States* v. *Scandifia*, 390 F.2d 244, 251 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969).

Finally Levy argues that the trial court erred (1) in failing to charge that "specific intent" must be proven; and (2) in its charge on entrapment.

On the issue of intent, the trial court charged the jury:

> "I have used the words 'Knowingly, unlawfully, wilfully.' An act is done knowingly if it is done voluntarily and purposefully and not because of mistake, accident, negligence or some other innocent reason. An act is wilful if it is done knowingly and deliberately."

This language was sufficient to inform the jury of the state of mind required to establish guilt. Further instruction on "specific intent" was unnecessary.

On entrapment the court charged:

> "In considering that issue [entrapment] bear in mind that the burden is on the defendant to adduce some

> evidence that a government agent by initiating the illegal conduct himself induced the defendant to commit the offense. If you find that the defendant Levy has adduced such evidence then the government must prove beyond a reasonable doubt that the inducement was not the cause of the crime, that is, that the defendant Levy was ready and willing to commit the offense."

The charge is in accord with the position taken in this Circuit. See, e.g., *United States* v. *Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952), reversed on other grounds, 356 U.S. 369 (1958); *United States* v. *Henry*, 417 F.2d 267, 269-70 (2d Cir. 1969), cert. denied, 397 U.S. 953 (1970); *United States* v. *Guidice*, 425 F.2d 886, 889-90 (1970).

## IV.

### Count Three

Feinstein and Levy both contend that the evidence was insufficient to allow the jury to conclude that either of them knew of or participated in the illegal kickback to Webb. We agree and therefore do not have to reach the other assignments of error urged by them.

### A. Feinstein

On the crucial question of whether Feinstein knew that the illegal kickback was paid, all that appears is Graff's testimony that "I asked Mr. Berger once if Mrs. Feinstein knew that Mr. Webb was being taken care of, that he was to be given $20,000, and he told me that she knew that Mr. Webb and I were friends and in the situation I was taking care of Mr. Webb, but, I mean, I wasn't there." On the other hand Graff stated specifically that he never told Mrs. Feinstein that he was going to give Floyd Webb $20,000 out of the funds he received in connection with the Central State loan to Cashmere.

The government showed only that Feinstein used her position and contacts to get for herself a $22,500 fee which she wanted to conceal, and that she was somehow associated with Berger and Graff.

We hold that the evidence against Feinstein was insufficient to go to the jury.

B. Levy

The evidence against Levy on Count Three showed only that Levy met with Feinstein and Graff to discuss financing for Cashmere, that at the time he asked Itkin's help in obtaining interim money for Cashmere from Local 10 Levy "guaranteed" to Itkin that the Teamsters would issue a loan commitment in a few months and that he promised that his Teamsters connections would get in touch with Itkin and Zulferino. It was also proved that Levy had an active part in helping Feinstein conceal payment of the $22,500 she received.

These facts fail to establish that Levy knew that Webb was paid an illegal kickback.

C. Berger[10]

Appellant Berger concedes that Graff's testimony, if believed, was sufficient to allow the jury to find him guilty. However he argues that it was error for the trial court to deny his repeated motions for a severance and a separate

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[10] Berger does not press here, but preserves for further appeal the question of whether his Fifth and Sixth Amendment rights were violated when the prosecution, having been advised that he would assert his constitutional right not to testify and knowing that he was a "target" of the inquiry, nevertheless summoned him before the grand jury and forced him to invoke his rights before that body, which then proceeded to indict him. See, e.g., *United States* v. *Corallo*, 413 F.2d 1306, 1328 (2d Cir.), cert. denied, 396 U.S. 958 (1969); *United States* v. *Wolfson*, 405 F.2d 779, 784-85 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969).

trial. He contends that parts of the evidence introduced which pertained only to Count Two were so prejudicial to his case that we must reverse. In particular he submits that the testimony of Herbert Itkin requires this result.

Counts Two and Three were properly joined under Rule 8(b) Fed. R. Crim. P. Although the Local 10 commitment and the Teamster's loan were different transactions, they were clearly parts of "the same series of acts or transactions constituting an offense or offenses." *Id.* Levy's alleged participation in both transactions and the fact that in at least one important respect Itkin could have testified against Berger even in a separate trial[11] (see *United States* v. *Marti*, 421 F.2d 1263, 1271-72 (2d Cir. 1970)), justify the joinder as a substantial saving of judicial time.

While much of the evidence introduced at trial, including the bulk of Itkin's testimony, concerned only Count Two, the transactions involved in Counts Two and Three were quite separate and there is little possibility that the jury could have failed to ascribe the evidence to the count to which it related. Moreover the trial court's repeated limiting instructions provided an adequate safeguard against this possibility. See *Schaffer* v. *United States*, 362 U.S. 511 (1960); *United States* v. *Corallo*, 413 F.2d 1306, 1327-28 (2d Cir.), cert. denied, 396 U.S. 958 (1969); *Stern* v. *United States*, 409 F.2d 819, 820 (2d Cir. 1969) (per curiam). *Bruton* v. *United States*, 391 U.S. 123 (1968), relied on by defendant, does not hold that such limiting instructions are always ineffective. See *Frazier* v. *Cupp*, 394 U.S. 731, 734-35 (1969); *United States* v. *Corallo*, *supra* at 1327.

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[11] Itkin described a meeting between Berger, Plumeri, Zulferino, Arsham and Itkin held in Berger's office in December, 1964 at which Plumeri threatened to stop the Teamsters' loan from going through. To prevent this, Berger guaranteed payment of $48,000 due on the unsuccessful Local 10 transaction, and agreed to halt Levy's attempt to demand repayment of monies given by Levy to Itkin to obtain interim union loans.

V.

Finally all of the appellants contend that the trial court committed reversible error by questioning a juror out of the presence of counsel after the jury had commenced its deliberations.

The jury deliberated during the afternoon and evening of Saturday, May 17, 1969, and was then sent to a hotel for the night. Before the jury met on Sunday morning to continue its consideration of the case the Court learned that one juror had left the hotel and spent the night at home with her husband. The Court questioned the juror and determined that she had misunderstood the instruction that the jury was to be sequestered, but that she had neither read about the case nor discussed it with anyone during her absence. "[C]onvinced that there had been no harm done," the Court permitted the jury to resume its deliberations.

When court convened shortly thereafter, counsel were notified of the incident. They claimed that since the trial court had not questioned the juror on the record, a mistrial was required. The Court denied that motion, recalled the juror and elicited on the record the same information as had previously been reported to counsel. None of the lawyers took up the Court's invitation to question the juror themselves.

While the better course for the trial court would have been to question the juror initially with counsel present, appellants can point to no prejudice resulting from the court's action. It certainly does not rise to the level of reversible error. See *United States* v. *Breland*, 376 F.2d 721, 722-23 (2d Cir. 1967).

Affirmed as to Berger, and as to Levy on Count Two. Reversed and indictment ordered dismissed as to Feinstein. Reversed and Count Three ordered dismissed as to Levy.

## APPENDIX B

**Title 18, United States Code**

**§ 371. Conspiracy to commit offense or to defraud United States.**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

**§ 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.**

(a) Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer and of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer,

any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: Provided, that this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act, as amended, and (b) "employee organization" and "administrator" as defined respectively in section 3(3) and 5(b) (1) and (2) of the Welfare and Pension Plans Disclosure Act, as amended.